United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by:
Eugene Welch

Docket No. 75-1201

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P/S

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

—v—

FRANK S. CANNONE, STANLEY A. RAPPUCCI, THOMAS A. GAETANI, JON N. ENGLISH, JOSEPH N. MARUCA, VINCENT N. CHRISTINA, ANTHONY R. SANTACROSE, JR., RAYMOND D. MASCIARELLI, JAMES W. McGRATH, ANDREW J. QUINLAN and THOMAS A. ABBADESSA,

Appellees.

—and—

UNITED STATES OF AMERICA,

Appellant,

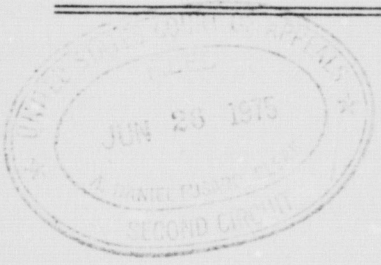
—v—

RAYMOND D. MASCIARELLI and LAWRENCE SCHULTZ,

Appellees.

On appeal from the United States District Court
Northern District of New York

BRIEF FOR APPELLANT,
United States of America



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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. DOES A DISTRICT COURT JUDGE HAVE THE AUTHORITY TO ORDER THE PRE-TRIAL DISCLOSURE TO THE DEFENSE OF THE NAMES AND ADDRESSES OF THE GOVERNMENT'S WITNESSES?

2. IF SUCH A PRE-TRIAL DISCLOSURE IS WITHIN THE DISCRETION OF A DISTRICT COURT, WAS SUCH AN ORDER FOR PRE-TRIAL DISCLOSURE AN ABUSE OF DISCRETION IN THE CIRCUMSTANCES OF THIS CASE?

STATEMENT OF THE CASE

This case is before the Court on the government's appeal pursuant to Title 18, United States Code, Section 3731. The government is appealing a pre-trial order of the district court requiring the disclosure to the defense attorneys of a list of the names and addresses of the government's witnesses intended by the government to be called in the presentation of its case-in-chief at trial, as well as an amendment to that order excluding the testimony of any witness not so disclosed.

On November 18, 1974, a Federal Grand Jury sitting in Syracuse, New York, returned the two indictments involved herein: United States v. Frank S. Cannone, Stanley A. Rappucci, Thomas A. Gaetani, Jon N. English, Joseph N. Maruca, Vincent N. Christina, Anthony R. Santacrose, Jr., Raymond D. Masciarelli, James W. McGrath, Andrew J. Quinlan, and Thomas J. Abbadessa, Indictment No. 74-CR-142; and United States v. Raymond D. Masciarelli and Lawrence Schultz, Indictment No. 74-CR-144. The Cannone indictment, set forth in the Appendix, (A1), contains three counts indicting a total of eleven people. Ten defendants are indicted for conducting an illegal gambling business, in violation of Title 18, United States Code, Section 1955; and conspiracy to do so, in violation of Title 18, United States Code, Section 371. Count III of the Cannone indictment charges one of those first ten defendants and an eleventh defendant with obstruction of justice, in that they did beat a grand jury witness the very next day after that witness had testified before the grand jury. Count III

alleges the beating was because of his grand jury testimony and charges a violation of Title 18, United States Code, Section 1503. The second indictment, the Masciarelli indictment, (A4) charges one of the original ten defendants in the Cannone indictment, Raymond D. Masciarelli, and a twelfth defendant, Lawrence Schultz, with interstate transmission of wagering information, in violation of Title 18, United States Code, Section 1084(a).

On December 10, 1974, all of the defendants in the Cannone case and one of the defendants in the Masciarelli case were arraigned and entered not guilty pleas (A5). Subsequently, demands for discovery were made by various defense counsel in both cases including inter alia, a list of the government's witnesses (A21). On January 13, 1975, the Honorable Edmund Port, United States District Court Judge, Northern District of New York, heard argument on the defendants' motions for discovery, including discovery of the government's witnesses. Those motions are set forth in the Appendix (A25, 35, 44, 50). The government, in its brief written responses to the defense's motions for discovery, had specifically opposed the disclosure of the government's witnesses. (A25, 35, 44, 50). During the course of arguments on the pre-trial discovery motions on January 13, 1975, the only statement concerning government witnesses made by anyone on the record that day was that of defense attorney Scaccia. "I had made a demand for the witnesses, and the government has refused, and I don't know of any authority that entitles me to pursue that. I don't know of any authority that I can cite to the Court." (A 79). The district court then orally ordered discovery to the extent agreed to by the government, and directed that government counsel prepare a written order incorporating his oral ruling. The district court said nothing about disclosure of the government's witnesses at that time.

On that day, January 13, 1975, government counsel left work on sick leave and was subsequently diagnosed to have a serious contagious illness. The cases were scheduled by the court to be called at a Calendar Call on January 31, 1975 To Fix A Date For Trial during the month of February. Because of the illness of government counsel, no discovery had been completed and the defense indicated they could not be prepared to go to trial during the month of February, and on January 31, the court removed these cases from the February Calendar. (A103).

On March 4, 1975, the case appeared on a Calendar Call, To Fix A Date For Trial, during the month of March. One defense attorney appeared before the Honorable James T. Foley, Presiding Judge at that calendar call, to argue that the defense could not be ready to go to trial that month since, because of government counsel's illness, the required court-ordered disclosures had not yet been accomplished. The defense attorney also sought a ruling concerning the six months rule. Judge Foley directed that these matters be brought to the attention of Judge Port, whose discovery order was involved, and who had a more detailed knowledge of the case. (A106). Pursuant to Judge Foley's referral, Judge Port on March 10, 1975 held a brief hearing to determine the status of the case and to allow defense counsel an opportunity to be heard concerning the speedy trial argument. At that hearing (A122), the trial court indicated that in view of the Assistant United States Attorney's serious illness, Judge Port would prepare his own order incorporating his January 13 rulings on the discovery motions. On March 11, 1975, the court issued a written order which is the subject of this appeal (A134). For the first time Judge Port ordered the disclosure of the government's witnesses.

Subsequently, the government filed a motion seeking a reconsideration of that part of the March 11 order

requiring the disclosure of the government's witnesses. (A137). The government argued, in its motion papers, that although it was unclear whether the court had the authority to issue this kind of disclosure order, the government would assume that it did for the purposes of that motion without conceding the existence of that authority. The government argued that, in view of the circumstances of this case where some defendants had already beaten a grand jury witness, according to the allegation in Count III of the Cannone indictment, and in view of two other instances of attempts to influence witnesses, which instances the government supported by materials submitted for in camera inspection (A164), Judge Port should vacate that part of his order requiring pre-trial disclosure of all of the government's witnesses. The government further contended that there had been no showing of any kind by the defense to justify this broad disclosure of all the government's witnesses. Two defense attorneys filed responsive affidavits, (A155, 159), which simply reasserted that such disclosure would, or course, help them to prepare for trial.

At the hearing on this motion, (A164), Judge Port indicated that it had been a mistake on his part to have incorporated the disclosure of the witnesses in his March 11 order (A178). Judge Port indicated at the April 14, 1975 hearing that his normal policy is to require such broad disclosures, and in preparation for the January 13, 1975 hearing, he had made notes to the effect that he would order the disclosure of the witnesses as a result of the demands of the defense attorneys. Judge Port indicated, however, that since the defense attorneys gave him no authority at the January 13 hearing for such disclosure, he changed his mind about requiring it. Judge Port went on to say that in preparing the written order two months later, in March 1975, he referred to his original notes and inadvertently included the disclosure of the government's witnesses. From the tenor of Judge Port's colloquy with counsel at the

April 14, 1975 hearing, it was anticipated that Judge Port would vacate that part of his discovery order. He reserved decision, however, so that he could take that opportunity to review the materials concerning the two additional attempts to influence witnesses that had been submitted for in camera examination. (It should be noted that those materials having to do solely with the two additional instances where there were attempts to influence witnesses, were sealed by the court and were made part of the original record to be transmitted to Court of Appeals. Because they were sealed by the court, the government has not reproduced those materials in the Appendix. The Court of Appeals, of course, has the power to unseal them for review in determining its decision on this appeal.) During the course of that hearing the defense attorneys still made absolutely no showing of materiality, reasonableness, or necessity for such a broad pre-trial disclosure of all the government's witnesses.

By written order dated April 18, 1975 (A180), Judge Port denied the motion of the government to vacate that part of his March 11 order requiring disclosure of its witnesses. Neither the April 18, 1975 order or the March 11, 1975 order imposed any sanction on the government for non-compliance. Consequently, on April 30, 1975, (A182), the government requested that the court impose some sanction so that an appeal to this court could be taken, allowing for an orderly disposition of the serious questions of law and policy involved herein. The next day, May 1, 1975, Judge Port imposed a sanction by ordering that the testimony of any witness whose name and address had not been disclosed in accordance with his March 11, order shall be excluded on the trial of these actions. (A183).

On May 8, 1975, the government filed its Notice of Appeal (A185) and in order to insure compliance with 18 U.S.C. §3731, the government attached a Certification

to its Notice of Appeal on May 27, 1975, to the effect that this appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in these proceedings (A186).

By motion dated May 7, 1975, returnable May 8, the government sought a stay pending appeal of the exclusionary ruling of Judge Port dated May 1, 1975, as well as a stay of all trials in these matters pending disposition of the appeal (A189, 196). As can be seen from the transcript of the May 8, hearing on that motion, the court directed that a Show Cause Order be issued to defense counsel directing defense counsel to show cause why that relief should not be granted (A203). By letter and by personal appearance, defense counsel noted no objection to these stays pending appeal (A209, 210, 211) and by order of May 15, 1975, District Judge Edmund Port adjourned all the trials in these matters until at least 15 days from the date of a final ruling by the Court of Appeals for the Second Circuit (trial of Counts I and II in Cannone; trial of Count III which had been severed by Judge Port; and trial of Masciarelli and Schultz). Judge Port further ordered that the effective date of his March 11, and May 1, 1975 orders would be stayed for the same period of time (A223).

POINT I

THE ISSUES HEREIN ARE PROPERLY BEFORE THIS COURT.

The issues herein are properly before this Court pursuant to the government's statutory right to appeal pursuant to 18 U.S.C. §3731. Judge Port has ordered disclosure of the government's witnesses or else their testimony will be excluded from the trial. The statute is clear:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district

> court ... excluding evidence in a criminal proceeding. ...

The record demonstrates that this decision of the district court was not made after the defendants had been put in jeopardy and before a verdict. It was a ruling on defense pre-trial discovery motions.

The government has certified to the district court that the appeal is not taken for purposes of delay and that the excluded evidence is a substantial proof of a fact material in the proceeding (A186). The district court, apparently recognizing the importance of these issues and the good faith in the government's appeal, granted a stay pending appeal. (A223).

The orders appealed from herein are quite similar to that order of Judge Battisti which the Sixth Circuit has held was an appealable order, United States v. Battisti, 486 F.2d 961, 965-967 (6th Cir. 1973).

In the event that this Court disagrees with the Sixth Circuit, that these are appealable orders, the government respectfully submits that these issues are properly before this Court on another basis. The government respectfully requests that, in the event this Court is of the opinion that these are not appealable orders, then this Court should treat this appeal as a petition for a Writ of Mandamus, requiring the district court to vacate its pre-trial disclosure order as beyond the district court's authority or, if within its discretion, then a blatant abuse of that discretion in the circumstances of this case. This Court has the authority to issue the Writ of Mandamus even if the matter is outside the scope of §3731 if the district judge's order was beyond his power or inconsistent with "accepted principles and usages of law." United States v. Weinstein, 452 F.2d 704, 713 (2d Cir. 1971), cert denied 406 U.S. 917 (1972).

As can be seen from the remaining arguments, it is the government's position that these pre-trial discovery orders were beyond Judge Port's power or in the alternative an abuse of discretion in these circumstances. Therefore, we submit that because they exclude the government's evidence pre-trial, they are appealable or in the alternative because they are orders beyond his power or an abuse of any discretion he may have they can be remedied by a Writ of Mandamus.

POINT II

THE DISTRICT COURT HAD NO AUTHORITY TO ORDER THE PRETRIAL DISCLOSURE OF THE GOVERNMENT'S WITNESSES.

The government respectfully submits that the district court judge had no authority to order the pre-trial disclosure of all of the government's witnesses. This point was not expressly made in the court below since it was clear to the government that Judge Port had already made up his mind that the matter was within his discretion and, therefore, the government simply attempted to persuade Judge Port to exercise his apparent discretion in favor of the government's position. For example, it can be seen from the April 14 hearing that Judge Port was already convinced that this was within his discretion (A169, 176, 177). The government, in the court below, did not concede that the court had this authority. Rather, we simply assumed that in view of the present disposition of the district judge that he had that authority, we would argue the second point only, that is, that it should be exercised in favor of the government. We submit, therefore, that this point is properly preserved for appeal.

At the outset, it should be noted, that nowhere in the United States Code or the Federal Rules of Criminal Procedure, is the District Court specifically authorized

to, or prohibited from, ordering pre-trial disclosure of the government's witnesses in a non-capital case. Title 18, United States Code, Section 3432 requires pre-trial disclosure of the government's witnesses in capital cases only and if it had so intended, Congress could have extended this pre-trial disclosure to non-capital cases. Rule 16, Federal Rules of Criminal Procedure, allows a limited discovery of defendants' statements and scientific test results but specifically excludes from pre-trial discovery, witnesses statements which are discoverable only pursuant to 18 U.S.C. §3500. Congress, in enacting Section 3500, specifically prohibits the discovery of witnesses statements until the witness has testified at trial. In view of these factors, it is clear that if Congress or the drafters of the Federal Rules of Criminal Procedure had intended that district courts should have the authority to grant pre-trial disclosure of the government's witnesses, they could have specifically stated this in a rule or statute. The fact that they have placed restrictions on disclosure of statements is a good indication that they had no intention of providing any pre-trial disclosure of the government's witnesses.

In addition, the proposed new Rule 16(a)(1)(E), specifically provides for the addition to the Rules of a right to this discovery by defendants, and Rule 16(d)(1) specifically gives the District Court authority to deny such discovery. Proposed Rules of Criminal Procedure, 62 F.R.D. 304 (1974). From this it appears that under the present status of law the defendants did not have the right to make such a demand nor did the court have the authority to grant such a demand.

The Second Circuit Court of Appeals has not specifically ruled on the authority of a district court to issue such a broad pre-trial discovery order. It has, however, assumed this authority without considering the merits of that assumption. See for example, United

States v. Baum, 482 F.2d 1325 (2d Cir. 1973). In considering whether Judge Weinstein could acquit a defendant on credibility grounds even though the evidence was legally sufficient to go to the jury, this court has considered what authority a judge has in matters not specifically authorized by the rules:

> We believe the failure of the Rules to bestow such a power precludes its exercise. The Federal Rules of Criminal Procedure were designed to provide a uniform set of procedures to govern criminal cases within the federal courts consistent with the requirements of justice and sound administration. Where previously recognized powers were thought appropriate for inclusion in the rules, this was expressly done. ... If the interests of justice would be served by bestowing so broad a power as that here invoked...the Supreme Court's power to amend the Rules is adequate to that end.

United States v. Weinstein, 452 F.2d 704, 715 (2d Cir. 1971), cert. denied 406 U.S. 917 (1972).

As can be seen then, this rule making by rendering a decision is not appropriate for a district judge, but rather should be performed by the Supreme Court in its rule making function or by the Congress. Further instruction on this question can be gleaned from this Court's ruling in United States v. Percevault, 490 F.2d 126, 130, 131 (2d Cir. 1974). Although resolving a question of construction of Rule 16 in conjunction with Section 3500, the discussion therein makes it clear that the Rules of Discovery in criminal cases should not be used "to provide the defendant with access to the entirety of the government's case against him". In limiting the discovery of witnesses statements this court pointed out that "fear of intimidation of witnesses and concern over efforts to suborn perjury were not flights of fantasy by those who drafted Rule 16". If this fear of

intimidation of witnesses played such an important role in the drafting of Rule 16 as it presently exists, certainly this Court must agree that there should be just as much concern over the disclosure of the identity of witnesses as there is over the disclosure of their statements.

A review of the cases concerning this authority of a district court to order disclosure of the government's witnesses indicates that only one circuit court has recently analyzed the question and rendered an informed decision. United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975), petition for rehearing denied, _____ F.2d _____ (7th Cir., April 15, 1975). The government submits that the Jackson case is erroneous and distinguishable from the case sub judice.

In Will v. United States, 389 U.S. 90, 88 S.Ct. 269 (1967), the Supreme Court reversed a Seventh Circuit writ of mandamus against Judge Will because there was no sufficient basis in the record to justify the extraordinary writ. District Judge Will had ordered a bill of particulars setting forth a list of certain witnesses to whom the defendant had made certain admissions. The court specifically noted in 389 U.S. at 95, 88 S.Ct. at 273, that it was not reaching the question of the propriety of Judge Will's order, and in its further discussion indicated that a district judge had broad discretion in regard to bills of particulars, but did not specifically rule upon its authority to order disclosure of all the government's witnesses.

In United States v. Battisti, 486 F.2d 961, 965 (6th Cir. 1973) the Sixth Circuit denied a petition for a writ of mandamus on the basis that the court's pre-trial disclosure order requiring the disclosure of the government's witnesses was an appealable order and therefore mandamus was not available. The Sixth Circuit, at page 965, specifically noted that the government was contending such an order was beyond the discretion

given to a district court and that if the matter were properly before that court, it would be a serious issue.

In United States v. Richter, 488 F.2d 170 (9th Cir. 1973) the Ninth Circuit indicated that it appears within the district court's discretion to issue such an order but with limitations that the defense must present some showing of materiality, reasonableness, and necessity. The court at page 175 specifically noted that a mere statement to that effect by the defense would be inadequate. Once such a showing had been made by the defense, the court went on to say, the government should have an opportunity to make a showing in opposition to this discovery. Richter is therefore not a holding to the effect that the district court has carte blanche authority to order this broad discovery. The Richter court discusses with some scepticism whether this authority would stem from Rule 57(b), Federal Rules of Criminal Procedure, 488 F.2d at 173, ftn. 8.

It is the government's position here that Rule 57(b) does not authorize a district court to issue such a broad discovery order. Rule 57(b) says "if no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or any applicable statute". In view of the limits in Rule 16(b), Federal Rules of Criminal Procedure, and the Statute, 18 U.S.C. §3500, it is the government's position that the procedure of ordering pre-trial disclosure of all of the government's witnesses is patently inconsistent with the limitation of Rule 16(b) and Section 3500.

The government respectfully submits that the trend in this circuit is toward not allowing such a broad pretrial disclosure of all the government's witnesses. Although not concerning itself with the authority of a court to issue such an order, this Circuit in United States v. Persico, 425 F.2d 1375, 1378 (2d Cir. 1970), cert. denied, 400 U.S. 869 (1970), has indicated that there

is no obligation on the part of the government to inform the defense of its intention to call any particular witness in a non-capital case. The government submits, therefore, that the only apparent authority for such a broad disclosure order is the recent Jackson opinion of the Seventh Circuit, 508 F.2d 1001 (7th Cir. 1975) and the government respectfully submits that this court should not accept the reasoning of the Seventh Circuit in Jackson.

Jackson affirmed a district court's dismissal of an indictment on the basis of the government's failure to comply with its pre-trial order to disclose a list of its witnesses. Jackson dealt with an order requiring the disclosure to the Court as well as to the defense attorneys so that the Court could properly plan its trial schedule as well as foster more meaningful cross-examination at trial and properly question prospective jurymen as to whether they knew any of the more than 100 expected government witnesses. Jackson is not an order based upon a pre-trial discovery demand of the defense but, rather, was an order entered under the guise of Rule 17.1, Federal Rules of Criminal Procedure, which rule is designed to provide for pre-trial conferences to enable the court and counsel to better organize the actual trial. Judge Port herein had none of these factors in mind, with the possible exception of fostering better cross-examination. Judge Port was clearly ruling under what he thought was his discretion under Rule 16, pre-trial discovery. Clearly, Judge Port herein was not concerned with facilitating docket control, he did not require this disclosure be made to the court, but just to the defense attorneys. If such a pre-trial disclosure should be required in order to facilitate meaningful cross-examination, Congress should have so stated or the Supreme Court should have so stated in its rule-making function. Quite the contrary, however, Congress in enacting Section 3500 prohibiting pre-trial disclosure of witnesses' statements, had indicated that the need to protect against intimidation of

witnesses and subornation of perjury outweighs the need to foster more productive cross-examination at trial. The third alleged purpose of upholding the order in Jackson, to protect against jurors knowing witnesses by a more informed voir dire of the jury, is not a valid purpose. The presiding judges in the Northern District of New York do not inquire of the jurors in this district during the voir dire as to whether they know any of the prospective witnesses. Judge Port did not order this disclosure with that in mind, therefore. In addition, the need to protect witnesses far outweighs the need to protect against surprise recognition of a witness by a juror especially in view of the fact that alternate jurors are selected and can replace any jurors who may not be able to render a fair verdict as the result of knowing a witness. It is clear, therefore, that the three reasons the Seventh Circuit cited for justifying such broad pre-trial disclosure of government witnesses, are simply not valid in this district.

The government respectfully submits, therefore, that in view of the lack of any statute or rules authorizing this broad disclosure and the clear inconsistency of such disclosure with the restrictions imposed by Rule 16(b) and Section 3500 of Title 18, the district court does not have the authority to order pre-trial disclosure of the government's witnesses. In view of the erroneous reasoning of the Seventh Circuit in Jackson, and the clear distinctions between Jackson and these cases, the government respectfully submits that Jackson should not be followed by this circuit.

POINT III

THE DISTRICT COURT ABUSED ANY DISCRETION IT MIGHT HAVE BY ORDERING DISCLOSURE OF ALL THE GOVERNMENT'S WITNESSES IN THE CIRCUMSTANCES OF THIS CASE.

The proposed new Rule 16 of the Federal Rules of Criminal Procedure, presently scheduled to take effect August 1, 1975 Public Law 93-361, July 30, 1974, 88 Stat 397 might make the issue discussed in Point II above academic. The proposed Rule 16 (a)(1)(E) will make disclosure of the government's witnesses available on demand by the defense, 62 F.R.D. 305 (1974). The amended Rules effective August 1, 1975 "shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending." 62 F.R.D. 327 (1974). In view of the discretion clearly vested in the district courts by the new Rule 16 (d)(1), 62 F.R.D. 307 (1974),

> Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon request by a party the court shall permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

the question discussed in this point will remain critical. In view of the circumstances of this case did the district court abuse its discretion in ordering this disclosure, if the Court, in fact had the discretion to enter such an order in the first place? The government respectfully

maintains a district court, in a pre-trial situation, does not have the authority to compel the government to disclose its witnesses and therefore these orders entered by Judge Port should be reversed. If this Court should be inclined to hold that Judge Port had the authority to enter such an order then we respectfully submit this is not the case for the exercise of that authority and these orders should be reversed on this alternative ground.

Here the defense simply made the motion for discovery of all the government's witnesses in pre-trial discovery proceedings and the government opposed. The judge did not grant this discovery initially, but inadvertently did grant it at a later date. When the government brought on a motion to reconsider, demonstrating substantial reasons for denying this discovery, the Court acknowledged its error and seemed to be leaning towards denying this discovery. In response, the defense merely stated they needed the list of witnesses to prepare for trial, a response which the Court in United States v. Richter, 488 F.2d 170, 175 (9th Cir. 1973), indicated was inadequate. The government, on the other hand, had pointed out that at least two defendants had been indicted by the grand jury for beating a grand jury witness and in addition submitted material to substantiate two other instances of attempts by some of these defendants to influence witnesses. The fact that two defendants had been indicted for beating a witness should be sufficient, standing alone, to justify extreme caution in pre-trial disclosures. Yet the district court ignored this clearly demonstrated danger to the witnesses and ordered the disclosure of all the government's witnesses. This Court must protect the orderly administration of justice in this district by reversing this patently incorrect disclosure order.

At the April 14, 1975 hearing on the government's motion to reconsider, Judge Port and the defense seemed to argue that Count III, the beating of a grand

jury witness, should be disregarded because it has been severed for trial. The government submits that it is immaterial that this count was severed. The fact still remains that Count III is a clear indication that at least some defendants are capable of harming the government's witnesses. The fact of severance only demonstrates that there will be three trials, making the exposure of the government's witnesses to risk of further harm even greater.

Assuming that it is a discretionary matter for the trial judge to decide whether there is any reason for granting a demand for a list of government witnesses, the reviewing courts discussed below indicate that the defense should make some showing as to why they should be disclosed. If the defense makes such a showing then the government should be heard as to why this discovery should be denied.

In Will v. United States, 389 U.S. 90, 88 S.Ct. 269 (1967), the Supreme Court was impressed with the fact that Judge Will limited his pre-trial disclosure order to those witnesses that the defense had demonstrated a need to discover. The defense had made a specific showing. The government, on the other hand, had not shown Judge Will any reason to deny this limited discovery of certain witnesses. The Supreme Court also noted that Judge Will had denied a demand for a list of all the government's witnesses.

In United States v. Baum, 482 F.2d 1325, 1329-32 (2d Cir. 1973) this Circuit discussed the factors to be considered in regard to disclosure of government witnesses. Although a conviction before Judge MacMahon was reversed in the Baum opinion the case supports the government's position in this case. Baum had moved for pre-trial discovery of the government's witnesses and Judge MacMahon denied the motion. At trial the government called a witness whose testimony was admitted on a delicate balancing by Judge MacMahon who

weighed the prejudicial effect of the testimony against its probative value. The defense then asked for a continuance to investigate the surprise testimony and Judge MacMahon refused to delay the trial. The Court of Appeals agreed with Baum that he was denied a fair trial because of the cumulative effect of being denied prior disclosure of the witness, being denied time during trial to meet this new evidence, and the highly prejudicial nature of the testimony. The Court of Appeals stressed that in Baum there were no valid considerations to justify concealment of this witness as there were in concealing the witness in Persico, cited above 425 F.2d 1375 (2d Cir. 1970). The Court of Appeals in Baum stressed that there would have been no danger to this witness caused by pre-trial disclosure because he was in custody and not as likely to be influenced as a man not in custody. The government contends that in this present case where a witness has already been beaten and others have been subjected to attempts to influence them, there is every reason not to order disclosure of all the government's witnesses.

In United States v. Richter, 488 F.2d 170, 173, 174-75 (9th Cir. 1973) the government appealed a pre-trial order dismissing the Indictment based upon the government's declining to comply with an order requiring pre-trial disclosure of its witnesses. The Court of Appeals reversed the district court indicating that such an order may be within the discretion of the District Court. The Court indicated, however, that there must be some showing of genuine need by the defense. Then the government must be given an opportunity to show the court the need for limiting that discovery. Neither of those steps had occurred in Richter. In the present case the defense has made no showing but the government has.

In United States v. Cole, 449 F.2d 194, 198 (8th Cir. 1971), cert. denied, 405 U.S. 931, the Court of

Appeals held it was not an abuse of discretion for the trial court to have denied pre-trial disclosure of all the government's witnesses, particularly where the record showed there were alleged threats to government witnesses. Herein the grand jury has found that a witness was actually beaten.

Without shedding much light on the subject the [illegible]th Circuit in United States v. Conder, 423 F.2d 904, 910 (6th Cir. 1970), cert. denied, 400 U.S. 958, has affirmed a denial of pre-trial discovery of the government's witnesses on reviewing a conviction. It said, "Similarly, the names and criminal records of government witnesses are not discoverable under Rule 16(b)."

Judge MacMahon has applied these basic guidlines in his often quoted case of United States v. McCarthy, 292 F.Supp. 937, 40-41 (S.D. N.Y. 1968). Judge MacMahon reasserted what had been said frequently before, "Particulars seeking the names of witnesses have almost uniformly been denied." In McCarthy, Judge MacMahon ordered pre-trial disclosure of some specific witnesses where there had been some specific showing of need by the defense. When there was no showing he denied the demand. He denied the general demand for a list of all the government's witnesses.

To date, the only case that refuses to require some showing of materiality or reasonableness is United States v. Jackson, 508 F.2d 1001, 1007 (7th Cir. 1975). The government submits that for the reasons stated in Point II above, Jackson, is incorrect.

The Jackson court and the Supreme Court in Will, supra suggest that the government should have applied for some sort of protective order when the Court gave the government that opportunity. In this case the government did apply for the only practical protective order and it was denied by the Court April 18, 1975 (A137, 180). There is no practical way to seek a protective

order when all the government's witnesses have been ordered disclosed. Three witnesses have already been subjected to influences herein, one was actually beaten. There is no way to protect the remaining witnesses short of maintaining their anonymity until they are called to testify; and the district court has refused to do this.

In view of the government's substantial demonstration of reasons for not ordering disclosure of the government's witnesses weighed against the utter failure of the defense to make any showing of materiality, reasonableness or necessity this Court should reverse Judge Port's discovery orders of March 11, and May 1, 1975 as a patent abuse of discretion.

CONCLUSION

On the basis of the reasons set forth above, the government-appellant respectfully submits this Court should reverse Judge Port's orders of March 11 and May 1, 1975 or in the alternative issue a Writ of Mandamus compelling Judge Port to vacate his orders of March 11 and May 1, 1975 and issue a new order denying the discovery of the government's witnesses.

Respectfully submitted,

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